Appendix

United States Court of Appeals
for the Ninth Circuit

JOSEPH E. SHEARER and GEORGIA P. SHEARER, *Appellants,* vs. JAMES G. SMYTH, United States Collector of Internal Revenue, *Appellee.*	No. 14,228 Apr. 22, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before Mathews and Orr, Circuit Judges, and Byrne, District Judge.

Per Curiam.

On the grounds and for the reasons stated in its opinion, Shearer v. Smyth, D.C.N.D.Cal., 116 F. Supp. 230, the judgment of the District Court is affirmed.

(Endorsed:) Per Curiam Opinion. Filed Apr. 22, 1955. Paul P. O'Brien, Clerk.

(Note): The opinion of the District Court is set forth in the printed record filed herewith, at pp. 16-22.

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JOSEPH E. SHEARER and GEORGIA P. SHEARER, *Appellants,* vs. JAMES G. SMYTH, United States Collector of Internal Revenue, *Appellee.*	No. 14,228

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: April 22, 1955

Paul P. O'Brien, Clerk.

RELEVANT PROVISIONS OF SECTION 117 OF THE INTERNAL REVENUE CODE OF 1939, AS APPLICABLE TO THE TAXABLE YEAR 1946.

Sec. 117. CAPITAL GAINS AND LOSSES.

(a) Definitions—As used in this chapter—

(1) Capital assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * * or real property used in the trade or business of the taxpayer.

* * * * * * *

(j) Gains and Losses from * * * Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of Property Used in the Trade or Business.—For the purposes of this subsection, the term "property used in the trade or business" * * * [includes] real property used in the trade or business, held for more than six months, which is not * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) General rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business * * * exceed the recognized losses from such sales [and] exchanges, * * * such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months * * *

(26 U.S.C. 1946 ed., Sec. 117.)

RELEVANT PROVISIONS OF REGULATIONS 111 APPLICABLE TO THE TAXABLE YEAR 1946.

Sec. 29.117-1 (As amended by T.D. 5425, Dec. 29, 1944).

Meaning of terms.—

The term "capital assets" includes all classes of property not specifically excluded by section 117(a)(1). In determining whether property is a "capital asset," the period for which held is immaterial.

The exclusion from the term "capital assets" * * * of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117(d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than 6 months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" even though depreciation may have been allowed with respect to such property under section 23(l) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the

ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117(b), (c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.

Section 29.117-7 (As amended by T.D. 5394, July 27, 1944).—Gains and losses from involuntary conversions and from the sale or exchange of certain property used in the trade or business.—

Section 117(j) provides that the recognized gains and losses

> (a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is
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> * * * * * * *
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> (2) real property,
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> provided that such property is not * * * held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. * * *